90-1587

No. 90-1587

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

CAPELETTI BROTHERS, INC., WEEKLEY ASPHALT PAVING, INC., WESTWIND CONTRACTING, INC., and HARDRIVES COMPANY,

Petitioners,

vs.

BROWARD COUNTY, and L.A. HESTER, the Administrator of Broward County,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED (RESTATED)

Whether a non-minority construction contractor has standing to challenge a county disadvantaged business enterprise ordinance in the absence of an allegation that a specific contract bid has been rejected for noncompliance with the law.

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STATEMENT OF THE CASE

The statement of the case provided by petitioners omits highly relevant factual information regarding the precise nature of the county ordinance challenged. The Disadvantaged Business Enterprise ("DBE") Ordinance assailed is a law directed to increasing the participation of small, disadvantaged business enterprises in county-administered procurement projects. The ordinance does not employ a mandatory quota system, or bind specific contracts to a set-aside pool.

Rather, it is a policy statement favoring affirmative action when necessary to attain broadly stated annual goals for the participation of disadvantaged minority contractors. *See,* County ordinance, § 20-275(1) and the opinion of the district court at petitioners' App. 3. The ordinance specifically cautions that its goals are "benchmarks for achievement, not mandates for complete attainment." § 20-276(1); Pet. App. 4. A waiver of the participation goal may be obtained on any contract opened for bidding by the county. The ordinance possesses only a rebuttable presumption that a minority contractor is disadvantaged. § 20-275(2)(a)-(c). If the presumption is challenged, then the disadvantaged contractor and the county must establish the particularized existence of social and economic disadvantage before the ordinance is applied. § 20-275(2)(c)(2).

Given the nature of this law – a non-quota, non-set-aside, waiver endowed affirmative action policy – it is understandable that the district court would conclude that it had been requested "to set itself up as a constitutional board of inquiry [to] issue an advisory opinion on

the constitutionality of the county's program. . . . " In the absence of allegation that petitioners had ever lost a contract due to the DBE ordinance, the district court found their challenge to lack Article III § 2 standing or ripeness.

Two other factual statements in the petition require comment. Reference is made to "sworn testimony of the principals of two of the plaintiffs" regarding effects of this kind of ordinance on non-minority companies, including an alleged loss of a specific contract by one of the petitioners. (Petition at 6, n. 1). That testimony was not addressed to the DBE ordinance. It was commentary regarding the alleged effects of a different ordinance, with different characteristics, which had been adopted by a different county in Florida. (Petition at 14). Petitioners' request to the district court to take judicial notice of this testimony was never ruled on.

This record contains an unrebutted affidavit of a county contracting official, based on a review of county records, which was filed in connection with the county's motion to dismiss. That affidavit indicated that bids submitted by petitioners (1) were not accepted because more competitive bids had been submitted by other prime contractors who had complied with applicable DBE goals, (2) were in fact accepted as lowest responsive bid, or (3) in one instance were rejected as the lowest bid solely for lack of a required competency certification which had nothing to do with the DBE ordinance.

Lastly, petitioners certainly enlarge upon the record when they argue that they must comply with the DBE

ordinance to their detriment "in order to remain in business." (Petition at 8). Perhaps petitioners may be granted some room to wax emotionally in their advocacy, but the fact is they supplied no proof which would even remotely suggest that their ability to compete and survive in the construction business in Broward County was impaired by the existing DBE ordinance. Indeed, the contrary implication can readily be drawn from the county's affidavit, demonstrating that at least one of the petitioners had obtained a construction contract in compliance with the ordinance.

The district court dismissed the suit with prejudice, based on petitioners' acknowledgment that they could not amend their claims to assert a contract they lost by virtue of the DBE ordinance. The court of appeals affirmed summarily on the basis of *Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1190 (11th Cir. 1991).

SUMMARY OF ARGUMENT

The petitioners do not have standing to challenge the DBE ordinance in the absence of pleading or proof that they have been denied a specific contract because of the law, or sought and obtained a waiver from application of the law. The mere fact that petitioners are contractors in Broward County, or that the DBE ordinance may increase their cost of doing business, does not change this result.

The law applies uniformly to all bidders for public contracts. There is no entitlement to a public contract and

assuredly no constitutionally-secured protection to a particular profit from a public contract. Petitioners' suggestion that compliance with the ordinance will impair their reputations or cause the demise of their businesses is an insubstantial and hypothetical concern.

The Eleventh Circuit decision in this case is consistent with decisions of the other courts of appeal. There is no reason for the Court to accept this case for plenary review on the basis of conflict.

ARGUMENT

1. Petitioners lack standing to sue.

The petitioners' argument on standing reads like a smorgasbord of case law fragments, diffusing the requirements of standing into nine questionable categories. (Petition at 10-18). This approach is a mask, designed to obscure their lack of the "injury-in-fact" which the law has always required. The Article III case or controversy requirement is traditionally viewed as a three-pronged test requiring (1) a clear demonstration of distinctive injury-in-fact, (2) causation, and (3) redressability. *Whitmore v. Arkansas*, ___ U.S. ___, 110 S.Ct. 1717, 1723 (1990). Each element must be separately shown, and courts are powerless to create jurisdiction by embellishing on deficient allegations of standing (*id.*) regardless of remonstrations that the consequence "is unduly restrictive, is unrealistic," or not in accord with what "most lawyers would feel, would constitute a 'case or controversy.' " (Petition at 6, 10). The three elements were not shown here.

At its core, the petitioners' argument consists of the view that compliance with the DBE ordinance harms them, for standing purposes, in two ways: (1) it increases costs so as to reduce their expected profits; and (2) it has an intangible effect on their reputation and quality of job performance, which in the long run will reduce the growth rate of their businesses. On these twin bases, they request a declaration of unconstitutionality and an injunction against continued use of the DBE ordinance. Nowhere in the record is there any suggestion that the ordinance has ever operated to deprive any of the petitioners of a single contract.

Petitioners' grounding for their suit, that the DBE ordinance exists and they do business in the county, has never been adequate to supply standing. First, the existence of government discrimination (assuming the ordinance does that) is not in and of itself a basis for relief. That is,

> an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. '[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.' (Citations omitted).
>
> Respondents . . . have no standing to complain simply that their Government is violating the law.

Allen v. Wright, 468 U.S. 737, 755-756 (1984).

Second, the petitioners have realistically raised no more than their status as interested public contractors to

challenge allegedly unconstitutional governmental conduct. A status-based claim has never sufficed to secure Article III standing. *Diamond v. Charles*, 476 U.S. 54, 66-68 (1986). Their mere presence as contractors ready and willing to perform public construction contracts does not satisfactorily allege injury "concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, ___ U.S. ___, 110 S.Ct. 1717, 1723 (1990). Petitioners have experienced no distinct and palpable injury. Their allegation of harm is neither actual nor imminent. Rather, it rests limply on the mere presence of a law, and their status as entities interested in changing that law. The vague fear that reputation and quality of workmanship will decline, unrooted in any specific example of such impact, must be rejected out of hand as too conjectural and hypothetical an expression of imminent or actual harm.

Decisively, the petitioners have failed to assert that any county bid has been foreclosed to them, or that one was not obtained after they sought a waiver of the DBE component in a particularized setting. Compare the grant of standing in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (specific bid lost because of set-aside requirement), with its denial in *Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1190 (11th Cir. 1991) (no contract specific loss alleged or proved).

An additional flaw in the petitioners' position is inherent in their "lost profits" thesis. A private party seeking a public contract has no constitutionally-based right to a particular expectation of profit or level of cost. To demonstrate a property interest in a public benefit, including the fruits of a public contract,

> [a] person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564, 577 (1977).

Petitioners possess no entitlement to a public contract. They may harbor a unilateral expectation that they may obtain one, but nothing more. The Court recently reiterated this point in *Metro Broadcasting, Inc. v. Federal Communications Commission*, ___ U.S. ___, 110 S.Ct. 2997 (1990), which sustained an affirmative action program established for minority-owned applicants of broadcast licenses. The Court there expressed the view that no applicants possessed a

> settled expectation that their applications will be granted without consideration of public interest factors such as minority ownership. Award of a preference . . . thus contravenes 'no legitimate firmly rooted expectation[s]' of competing applicants (citation omitted).

110 S.Ct. at 3026. The Eleventh Circuit has faithfully applied this well-settled principle. *Cunningham v. Adams*, 808 F.2d 815 (11th Cir. 1987); *Economic Development Corp. of Dade County, Inc. v. Stierheim*, 782 F.2d 952 (11th Cir. 1986). The absence of generalized entitlement to a public contract assuredly means there is no constitutionally protected interest in petitioners' unilaterally anticipated profit from that desired contract.

Turning to petitioners' fragmentation of standing, it can be demonstrated that even their nine sub-theses provide no more substance to the case than its whole. Petitioners first argue their challenge is ripe. It is not, in light

of the absence of real or imminent injury as discussed above. Without project-specific pleading, there is no showing that an ordinance applied on a case-by-case basis and open to waiver will ever affect them. Additionally, the lack of project specificity means that the Court cannot know the parameters of an equal protection or due process inquiry, for differing standards may well apply to federally-funded, state-funded or "hybrid" affirmative action policies. *Croson*, 488 U.S. 469, 109 S.Ct. 706, 726-727 (1989).

Petitioners' second element is mootness. This point is itself moot, of course, because there is no concrete, ripened controversy based on true injury. Any mootness question is simply irrelevant to this dispute.

The third element noted is the requirement of adverse litigants. The parties' alleged adversity stems only from the fact that they are named adversely in the lawsuit. These non-minority contractors are not adverse to Broward County vis-a-vis any interest or stake which is relevant to standing, as the county's DBE ordinance has not caused them to lose a contract. Nor is its mere presence even distinctive to them, since all potential contractors must utilize a DBE component or obtain its waiver.

The fourth element addressed is that the suit not be collusive or feigned. While this is certainly not a friendly suit, this cannot overcome the lack of any real controversy that would arise, for example, from a contract-specific controversy.

Petitioners' fifth element finally reaches the question of Article III injury. All that has been previously said will not be repeated here to prove once again the obvious

shortcomings of petitioners' position on this point. Their reliance on *Warth v. Seldin*, 422 U.S. 490 (1975), and on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), merits comment, however, if only to dramatize the insubstantial nature of their argument.

Petitioners here are like the prospective home builders who in *Warth* were found to lack standing for a failure to allege any specific project currently precluded by the zoning ordinance in question, or by the city's enforcement of it. *Warth*, 422 U.S. at 516. Those home builders further failed to allege that they had sought a variance from the ordinance with which they desired not to comply. *Id.* This is a direct parallel to petitioners' lack of project-specific pleading and to the absence of an averment that the DBE ordinance has caused a contract to be lost or an applied-for waiver denied.

Arlington Heights is no more fruitful for petitioners. The plaintiff there asserted a specific housing development to which he would move, but for the fact that discriminatory action had prevented its construction. In that circumstance, there could have been no more direct a proof of specific injury. Contrariwise, innumerable contracts have been let under the DBE ordinance here yet no government action has precluded these petitioners from obtaining a contract either by applying or by seeking a waiver.

The sixth factor addressed by petitioners is stated as a hybrid of injury and remedy. It addresses injury only, however, and even then is thrice flawed. The argument wrongly assumes that the mere existence of the ordinance

itself assures standing, which it does not. It wrongly asserts that added costs of compliance are constitutionally significant, which they are not. And it asserts that petitioners are losing work for having to comply with the ordinance, which is a factual flourish of the pen having no source in the record of this proceeding.

The seventh element proffered is that petitioners possess more than mere taxpayer status. Their having contractor status perhaps makes the contention true, but the argument misses the meaningful point. Like mere taxpayers (in the standing-deficient sense), petitioners are unable to demonstrate individualized injury because they can show no impact on them which is different from all others, similarly situated – that is, all other contractors. (Petition at 17). They must, of course, as *Croson* teaches. In that case, discrete injury befell a contractor who was barred by a set-aside mechanism from obtaining a specific contract. Notably, Croson's injury did not suffice as an at-large grant of Article III standing for all other potential Richmond contractors.

The eighth element proffered is that a litigant must assert harm to his rights or those of another which directly affect him. While this is a correctly stated subelement of the injury component of standing, it is not useful here. Petitioners argue that they should be free to choose subcontractors and suppliers without regard to race, or to bid and be chosen without regard to race. The Court's decision in *Metro Broadcasting* makes clear, however, that there is no absolute right to obtain a public contract without consideration of these factors. (In any event, the eighth element posed by petitioners is

decidedly a merits-based question which cannot be addressed in this case.)

The ninth element posed by petitioners is once again their unique re-characterization of the injury-in-fact component of standing. (Petition at 18-19). Their arguments boil down to assertions that a declaration of unconstitutionality will alleviate any potential harm to them, and that they are sufficiently "directly affected" by the DBE ordinance to make the dispute concrete. This version of the requirement that their injury be "distinct and palpable" is so watered-down as to be unrecognizable. The first prong is no more than an "ends justify the means" demand for relief. Petitioners' assertion that they may be directly affected by the ordinance, in the sense that they operate subject to the laws in Broward County, does not mean that Article III gives them license to test the constitutionality of the law.

In sum, the nine-factored incantation summoned by petitioners cannot magically conjure a concrete injury where there is none. They have no standing to challenge the ordinance.

2. The Court of Appeals decision does not conflict with other court of appeals decisions.

Neither the Court of Appeals' per curiam decision nor its earlier decision in *Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1190 (11th Cir. 1991), conflict with any other federal appellate court decision. Although petitioners claim conflict with two other courts of appeal (the First and Third Circuits), they fail to cite a single federal appellate decision to support that claim. (Petition at 20).

Their reliance, rather, is on district court decisions in those circuits to establish purported conflict. This reliance in fact confirms the prematurity of review.

As always, review should be postponed until appellate courts have had the opportunity to consider the applications of standing doctrines articulated here and in *Cone*. Nor would the Court's jurisdiction be prudently exercised merely to review any challenge, however inconsequential, simply because the petitioner attempts to (as here) bootstrap to the Court's recent decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989).[1]

In any event, the Court of Appeals' decision in this case and in *Cone* reflect no conflict even with the district court decisions cited by petitioners. *Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia*, 735 F.Supp. 1274 (E.D. Pa. 1990), for example, is wholly consistent with both this case and with *Cone*. There the district court found that four of nine contractor-associations possessed standing to challenge the constitutionality of DBE requirements because the pleadings and proof established palpable injury to members of the associations from a loss of bids or an exclusion from specific markets.[2] Five

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[1] Decisions rendered well prior to *Croson* are inappropriate support for conflict-based review. The Court does not wield its jurisdiction to prognosticate how pre-*Croson* cases would have been decided in *Croson's* new context.

[2] Those members had established that they had been the lowest bidders but had been disqualified, had been precluded from submitting a bid, or had been disqualified because they were not a minority bidder.

associations which were unable to establish individualized injury to any of their members were denied standing.

Similarly, *Rhode Island Chapter, Associated General Contractors of America, Inc. v. Kreps*, 450 F.Supp. 338 (D.R.I. 1978), and *Constructors Ass'n of Western Pennsylvania v. Kreps*, 441 F.Supp. 936 (W.D. Pa. 1977), are in harmony with the Court of Appeals' decision and with *Cone*. In both *Rhode Island* and *Kreps*, the plaintiff-associations demonstrated that some of their members lost bids or contracts or, in *Kreps*, that they lost the opportunity to be selected as a subcontractor because of DBE requirements. Under these circumstances, the associations were found to possess the necessary standing to litigate the constitutional questions posed.

Petitioners hypothesize conflict with *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), and *Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987). (Petition at 20-21, n. 13). Neither *Fiedler* nor *Milliken* generates decisional conflict, however, since neither mentions, much less addresses or passes on any Article III standing issue.[3] Silence on an issue creates no implication of a position, as the *Cone* decision duly noted.

> We are aware that two recent decisions of this circuit did not explicitly address the issue of

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[3] Even the district court decisions in *Fiedler* did not address the issue of standing, apparently because the defendants did not raise the issue. *Milwaukee County Pavers Ass'n v. Fiedler*, 707 F.Supp. 1016 (W.D. Wis. 1989); *Milwaukee County Pavers Ass'n v. Fiedler*, 710 F.Supp. 1532 (W.D. Wis. 1989).

> standing and allowed contractors to pursue declaratory and injunctive relief against the operation of county and city minority business set-aside programs. . . . Since the opinions handed down in support of these decisions did not address the standing issue, *we infer no view* on the issue from these decisions.

Cone, 921 F.2d at 1207 n. 52 (citations omitted) (emphasis added).

CONCLUSION

Petitioners have not identified one single decision which has conferred standing based on allegations as remote from a genuine case or controversy as those asserted here. The absence of any allegation of specific, palpable injury of an individualized nature was properly viewed as fatal to petitioners' standing by both the District Court and the Court of Appeals. Nor has a faithful application of the law of standing by the Eleventh Circuit created decisional conflict among the federal appellate courts. For these reasons, petitioners' request for the issuance of a writ of certiorari should be denied.

Respectfully submitted,

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